age state, have been largely changed by their intercourse with the whites, if they still retain their tribal organization, which is recognised by the national government, as shown by having its Indian agent among them, paying annuities and dealing otherwise with the "head men:" *The Kansas Indians*, 5 Wall. 737.

The Pacific Railroad claimed the benefit of the principle of *McCulloch* v. *Maryland*, upon the ground that the road was constructed under the direction and authority of Congress, for the uses and purposes of the United States, and was a part of a system of roads thus constructed, and that the aids granted by Congress to the road were in exercise of its powers to regulate commerce, establish post-offices and post-roads, to raise and support armies and to suppress insurrection and invasion. The claim was not sustained, the court drawing the distinction between the means employed by the government and the property of agents employed by the government. The instrumentalities created by the government for its purposes are exempt, but a corporation deriving its existence from state law, exercising its franchise under state law, and holding its property within state jurisdiction, is liable to state taxation for its property. The railroad is only an agent employed by the government, which employment entitles it to no peculiar privileges as to the taxation of its property: *Thomson* v. *Pacific Railroad*, 9 Wall. 579; *Railroad Co.* v. *Peniston*, 18 Id. 5.

W. H. BURROUGHS.

NORFOLK, VA.

RECENT AMERICAN DECISIONS.

Supreme Court of Rhode Island.

MARIANNA RAY *v.* JOSIAH SIMMONS.

B. deposited in a savings bank certain money in his own name as trustee for R. and gave the bank-book to R., who was his step-daughter; R. returned the book to B., in whose control it remained until his death. In an equity suit by R. against the administrator of B., claiming the deposit as trust funds held by B. for R.: *Held*, that the trust was completely constituted.

Held, further, that the trust being constituted, the fact that it was voluntary was no reason for refusing relief.

To constitute a trust it is enough if the owner of property conveys it to another in trust, or if the owner of personalty unequivocally declares, either orally or in writing, that he holds it *in presenti* in trust for another.

A bill in equity to enforce a trust brought against an administrator alleged that the respondent as administrator withdrew a bank deposit, being the trust funds

in question. The answer alleged the respondent's appointment as administrator in Massachusetts, and that as such he withdrew the deposit and held the same as part of his decedent's estate. *Held*, in the absence of denial by the administrator, that he held the deposit as administrator in Rhode Island, that the court would presume he held it as administrator in Rhode Island and would order him to account directly with the complainant, the trust having been proven.

IN EQUITY. The facts are stated in the opinion.

Charles M. Salisbury & L. Salisbury, for complainant.

Tillinghast & Ely, for respondent.

The opinion of the court was delivered by

DURFEE, C. J.—The principal question in this case is whether the plaintiff is beneficially entitled to a sum of money which was formerly on deposit in the Fall River Savings Bank. The deposit was made by the late Levi Bosworth, in his own name, as trustee for the plaintiff,—the account contained in the bank-book which was furnished to Bosworth being headed as follows, to wit: "Dr. Fall River Savings Bank, in account with Levi Bosworth, trustee for Marianna Ray, Prov. Cr." The first deposit of $484 is credited as cash, under the date of April 6th 1868. The account is also credited with cash, October 31st 1868, $50, and January 8th 1872, $70, and with divers dividends. All the dividends were credited as they accrued, except one of $25.66, which was paid to Bosworth, October 12th 1870. And this was the only money withdrawn from the deposit by him previous to his death, which occurred September 15th 1872. The plaintiff, Marianna Ray, is the daughter of Ruth M. Bosworth, the widow of Levi Bosworth, by a former husband. She lived in the family of Levi Bosworth for several years previous to his death. Levi Bosworth had no children. Mrs. Bosworth testifies that he treated the plaintiff as his daughter. She also testifies that the first she knew of the bank-book, Mr. Bosworth brought it home and threw it in the plaintiff's lap. The plaintiff opened and read it, and said she was much obliged for the present. Bosworth said nothing in reply. She, Mrs. Bosworth, put the book in a box where she kept her own bank-book, a bank-book of her daughter, and bank-books belonging to her husband. She says he carried the book to Fall River three times to have the interest entered, and gave it to the plaintiff on his return. He was a man of few words, and would do things without explanation. When he made the last deposit

of $70 and gave the plaintiff notice of it, she, Mrs. Bosworth, said to him: "I don't know about your making such presents!" to which he replied, "I shouldn't think you need trouble yourself about it; if anything happens to her, you will hold it."

The plaintiff claims to be entitled to the deposit, as money held in trust for her by Levi Bosworth. The defendant, as administrator on Bosworth's estate, resists the claim. His answer to her bill avers on information and belief that Bosworth made the deposit in his name as trustee for his own convenience, and because he had another deposit in his own name to as large an amount as the bank would receive on any one account, and therefore, to induce the bank to receive the further deposit, he put it in his name as trustee, as is a very common practice in such cases, always retaining the book under his own control. In support of this averment the defendant testified that Bosworth told him, when he was building his house, that he had money deposited in the Fall River Savings Bank, in his own name, to as large an amount as he could deposit in his own name, and in another person's name, but did not say in whose name. He also testified to conduct and admissions, on the part of the plaintiff and her mother, at variance with the plaintiff's present claim. We, however, refrain from reciting this testimony, because, in view of the explanations given by Mrs. Bosworth, we are not prepared to believe that her testimony is substantially incorrect.

The defendant contends that the plaintiff is not entitled to relief, because there was no effectual trust, inasmuch as Bosworth, by retaining the book, always kept and intended to keep control over the deposit for his own use, and did in fact so control it by receiving the dividend which was paid to him October 12th 1870.

We think, however, the trust was completely constituted. Levi Bosworth deposited the money in the bank to himself as trustee. The bank, receiving it, credited it to him as trustee, and, from time to time, credited to him as trustee the dividends accruing thereon. It gave him a bank-book in which these credits were entered. Bosworth moreover communicated to the plaintiff the fact that he had made the deposit to himself as her trustee by letting her have the book. It is urged that the book was returned to him by her, and retained by him. But the book was given by the bank to him as trustee, and as trustee he would properly re-

tain it. All was done which the plaintiff could ask, unless she desired to have the money paid or transferred to her, which would be not constituting the trust, but carrying into effect and discharging it. Bosworth might have declared himself more explicitly; but, supposing his object was to create a trust and make himself the trustee, we can think of no act necessary to effect his purpose which he has left undone.

When the trust is voluntary, courts of equity do not enforce it, so long as it remains inchoate or incomplete; but when once the trust has been constituted, they do not refuse relief because it is voluntary: *Stone et al.* v. *King et al.*, 7 R. I. 358. A person need use no particular form of words to create a trust, or to make himself a trustee. It is enough if, having the property, he conveys it to another in trust, or, the property being personal, if he unequivocally declares, either orally or in writing, that he holds it *in presenti* in trust or as a trustee for another: *Ex parte Pye*, 18 Ves. Jr. 140; *Milroy* v. *Lord*, 4 De G. F. & J. 264; *Richardson* v. *Richardson*, Law Rep. 3 Eq. 686; *Kekewich* v. *Manning*, 1 De G. M. & G. 176; *Morgan* v. *Malleson*, Law Rep. 10 Eq. 475; *Penfold* v. *Mould*, Law Rep. 4 Eq. 562; *Wheatley* v. *Purr*, 1 Keen 551 and note; *M'Fadden* v. *Jenkyns*, 1 Hare 458; affirmed on appeal, 1 Phillips 153; *Thorpe* v. *Owen*, 5 Beav. 224. And the creation of the trust, if otherwise unequivocal, is not affected by the settlor's retention of the instrument of trust, especially where he is himself the trustee: *Exton* v. *Scott*, 6 Sim. 31; *Fletcher* v. *Fletcher*, 4 Hare 67; *Carson's Adm'r* v. *Phelps*, 14 Am. Law Reg. N. S. 100; *Souverbye et ux.* v. *Arden et als.*, 1 Johns. Ch. 240; *Bunn* v. *Winthrop et als.*, 1 Johns. Ch. 329.

In *Wheatley* v. *Purr*, 1 Keen 551, the settlor instructed her bankers, with whom she had a deposit of 3000*l.*, to place 2000*l.* in the joint names of the plaintiffs and her own, as trustee for the plaintiffs. The sum of 2000*l.* was entered by the bankers in their books to the account of the settlor as trustee for the plaintiffs, and a promissory note given for it payable to the settlor trustee for the plaintiffs, or order, fourteen days after sight. A receipt for this note was signed by the settlor and given to the bankers. The trust was held to be effectually vested. In our opinion, the case is not distinguishable from the case at bar. Indeed, the case at bar is stronger, in that notice of the trust was communicated to the

cestui que trust. And see *Millspaugh* v. *Putnam*, 16 Ab. Pr. 380; *Howard, Adm'r*, v. *Savings Bank*, 40 Vt. 597.

The counsel for the defendant calls our attention to the declaration made by Mr. Bosworth while his house was building. The declaration was casually made, and may have been misunderstood. But, supposing it was correctly understood, we do not think we can allow it to alter our decision. The trust, except in so far as it was increased by subsequent deposits, was, in our opinion, created before the declaration was made; and no such declaration, made after the creation of the trust, could have any legitimate effect on it. The same is true in regard to the withdrawal of the dividend. It may be remarked, also, that the dividend withdrawn was more than replaced by the seventy dollars afterwards deposited.

The counsel for the defendant also calls our attention to the cases of *Brabrook* v. *Boston Five Cents Savings Bank*, 104 Mass. 228, and *Clark* v. *Clark*, 108 Id. 522. These are cases in which A. deposited money in a savings bank in his own name as trustee for B., but always retained the bank-book, and never communicated to B. any notice of the deposit. They are cases at law. The court ruled that B. was not entitled to the deposit, being neither party nor privy to the transaction. In one of the cases, the court found, as a fact affirmatively proved, that no actual gift or trust was intended. We do not think the cases are precedents which should govern the decision of the case at bar.

The bill is against the defendant, as administrator on the estate of Levi Bosworth. It alleges that the defendant, as administrator, has withdrawn the deposit and now has it in his possession, and refuses to pay it to the plaintiff. The answer alleges that the defendant was appointed administrator in Massachusetts, and as such withdrew the deposit; but does not deny that he now holds it as administrator in this state, but avers that he now holds the same as a part of the estate of the decedent. From this we presume that he holds it as administrator in this state. In this view, we think the defendant may be held to account directly with the plaintiff, and will decree accordingly.

Although the cases relating to the general subject of gifts of chattels without actual delivery of the subject-matter of the gift, may seem to warrant the charge of inconsistency and confusion in this branch of the law, a careful

study of the facts of each case will show that in most instances the inconsistency is more seeming than real. At common law, actual delivery and transmutation of possession was essential to the validity of the gift. In the class of cases here to be noticed, by the application of equitable principles in establishing a trust relation without this actual delivery, the intentions of the donor have been effectuated.

These cases naturally divide themselves into three classes: 1. Where there has been a formal written declaration of trust. 2. Where there has been no such formal declaration, but a trust is implied from the words and actions of the parties. 3. Where a formal assignment of a chose in action, though incapable of passing the legal title, has been construed as a declaration of trust.

1. The cases of this class, though few, are important, because in them is first recognised the principle, that if the trust relation is clearly established, equity will enforce it, although the trust be voluntary. In *Ellison* v. *Ellison*, 6 Ves. Jr. 656, Lord ELDON said: "I take the distinction to be, that if you want the assistance of the court to constitute you *cestui que trust* and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust*, as upon a covenant to transfer stock, &c., if it rests in covenant, and is purely voluntary, this court will not execute that voluntary covenant; but if the party has completely transferred stock, &c., though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court." In *Ex parte Pye*, 18 Ves. Jr., the same judge said: "The question involved is, whether the power of attorney here amounts to a declaration of trust. It is clear that this court will not assist a volunteer; yet if the act is completed, though voluntary, the court will act upon it. It has been decided, that upon an agreement to transfer stock, this court will not interpose, but if the party had declared himself to be the trustee of that stock, it becomes the property of the *cestui que trust* without more, and the court will act upon it."

The principles thus stated, being once established, little difficulty has been found in determining questions arising in cases of the first class. The difficulty in their application to cases of the second and third class arises from the uncertainty whether, in each special case, a trust has been created. The criterion to be applied is, do the facts warrant the belief that the donor intended to divest himself immediately of all beneficial right, title, or interest in the property given, and that he did everything which, considering the relation he might, in each particular instance, bear to the donee, and the nature of the property given, he could reasonably be expected to do, to unmistakably evince such an intention.

2. These cases of the second class may profitably be sub-divided according as the subject of the gift is a substantial chattel, or a chose in action. Living animals have been the subjects of nearly all the controversies which have arisen over alleged gifts of substantial chattels.

In *Hillebrant* v. *Lewis*, 6 Texas 45, a father branded certain cattle with a brand recorded in the name of an infant daughter, accompanying his action with declarations of a gift. The court held that these acts evinced an unmistakable intention, and that all was done which a father could do to complete a gift to his daughter, regarding his subsequent possession as that of a trustee. "What will amount to a delivery must depend on the nature of the thing and the circumstances of the case. Actual manual delivery is not in all cases necessary. Where the thing is incapable of actual delivery, or where the situation of the parties or the circumstances of the case

will not admit of it, it may be symbolical or constructive. There may be circumstances under which a gift may be valid and complete, as between donor and donee without delivery, and the possession of the former will not be inconsistent with the right of the latter." *Johnson* v. *Stevens*, 22 Louisiana An. 144, is distinguishable from this case, because there it appeared that the father when he branded the cattle had no present intention of giving them to his daughter, but to please her, as the statement of fact reads, allowed them to be called hers, and have a special brand placed upon them, intending finally to give them to her. When her subsequent marriage displeased him, he changed his purpose, and the court held, that there was no evidence that he had ever manifested an intention to divest himself of the property in them. In *Brink* v. *Gould*, 7 Lans. 425, a mother, owning two heifers, said to her daughter, then on a visit, "You may have either of them, whichever you choose." The heifers were not in sight; the daughter made no reply, and nothing more was said or done. The gift was held to be incomplete, because in view of the fact that the mother and daughter were living apart, a transmutation of possession would have been the natural consequence of a completed gift.

Spencer v. *Vance*, 57 Missouri 427, was decided on similar grounds, WAGNER, J., saying: "It is essential to a gift that it go into effect at once, and completely. If it regards the future, it is but a promise, and being a promise without consideration, it cannot be enforced and has no legal validity." *Brewer* v. *Harvey*, 72 North Car. 176, is a case where a different judgment, it would seem, might have been given without stretching very far the doctrine of a trust implied from the acts and relations of the parties. A father pointed out a colt to his daughter, saying: "That is your property; I give it to you" The daughter was then living with her father, and remained so until his death. Although the colt continued in the father's stable, it might have fairly been said, that considering the relation of parent and child, no actual change of possession could have been expected. The attention of the court does not appear to have been directed to the doctrine of the establishment of a trust, and it may be presumed that it entirely escaped their consideration.

Crawford's Appeal, 61 Penn. St. 52, seems to hold that in cases of gifts by husband to wife, or parent to child living at home, the necessity for an actual change of possession does not exist; AGNEW, J., saying: "The title of the wife to the $3000 credited to her on her husband's books could not be supported as an ordinary gift between strangers. Where the gift is not executed by delivery, but the determining act remains in fieri, the law gives no force to the mere intention to do it. But in this case, are not the facts sufficient to show an executed intention followed by a trust? The transaction was between husband and wife, and therefore influenced by their peculiar relation. He came in and said to her, 'I have added $3000 to your little money, and after a while I am going to give you $3000 more.' He did not hand her the money then, or at any time. But we find the money credited as if actually received, carried into an account of moneys admitted to belong to her, mingled with it, interest credited upon it, finally consolidated in the account, and interest added on the total sum. This is certainly ample evidence of an executed gift, followed by an express trust in the form of an account for it and its accrued interest, remaining unrevoked or denied by the decedent up to the time of his death. It cannot be doubted then that Crawford intended to fasten upon himself and his estate an

admitted gift, and to become trustee of the fund. It is true that there was no formal passing of the money between them, but this was a useless ceremony between husband and wife, where there is a clear executed intention to become the trustee of the fund for her benefit. In order to make such a formality effective, a witness must be called to see him hand the money to her and straightway receive it back. But of what greater efficacy would this be than the husband's own admission in his book, and his express direction to his bookkeeper? The difference is clearly one of the merest form, and not substance. Of what possible use can it be to go through a mere ceremony where the evident intent is to assume immediate possession as trustee?" If the court had applied these principles in *Brewer* v. *Harvey*, *supra*, the daughter probably would have kept her colt.

The principal case is one of several that have arisen in consequence of the alleged gift of bank deposit-books. These cases have been decided upon the same principle. The question for inquiry has been, Has the the donor clearly evinced his intention to create a trust, and has he done all that he ought to have done to make that trust relation complete?

In *Minor* v. *Rogers*, 40 Conn. 512, the defendant's intestate deposited $250 in a savings bank, receiving a deposit-book made out in her own name, "Mary Daniels, trustee of William A. Minor;" at the same time informing Minor's father of her action, but before her death drew out the deposit. In an action by Minor against her administrator for money had and received, the court said: "It is evident that she did all that she thought necessary to be done to perfect the gift, and supposed that she had accomplished the object. If she had made the deposit in the name of the plaintiff alone, or had made some other person than herself trustee for the plaintiff, no question could have arisen regarding the completeness of the gift. But the beneficial interest is as much given as it would have been if either of these modes had been adopted. The deposit is made in the bank for the plaintiff, and the bank is informed of the fact. Here is a delivery of the beneficial interest. No more would have been done if the deposit had been made in the name of a third party for the plaintiff." *Camp's Appeal*, 36 Conn. 88, and *Hill* v. *Stevenson*, 63 Maine 364, contained the additional fact that the books were actually delivered to the donees, but the deposits were simply made in the name of the donor. The gifts were sustained as valid. In *Blasdell* v. *Locke*, 52 N. H. 238, the donor deposited money in a savings bank, taking a book in the name of her niece, and just before dying informed her of the gift, and in *Howard* v. *Windham Bank*, 40 Vt. 597, where the facts were similar, except that the donee did not know of the intended gift, the gifts were sustained. In *Gardner* v. *Merritt*, 32 Md. 78, a deposit was made by a grandmother in the name of five minor grandchildren, but subject to her order, or that of her daughter. About the time of making the deposit, she said "she was going to put the money in bank for the children." After her death, her daughter drew it out and administered it as part of the assets of the estate. In an action by the grandchildren against the daughter to recover the amounts of the deposits, the court said: "A gift is inoperative without delivery. To be valid it can have no reference to the future, but must go into immediate and absolute effect. To the perfection of a parol gift of a chattel, delivery is necessary, and without actual delivery no title passes. The delivery may be to the donee, or to any bailee of the donee; all these conditions were met in this case. The money was delivered by the donor to the bank as bailee of the infants,

with the direction that it should be entered to their credit in accounts standing open in their names. The delivery to the bank for the benefit of the grandchildren was a perfected gift to them, and the control retained by her or her daughter was a control for the benefit of those for whose use the money was delivered, and not such control as would pertain to a continuing legal power and dominion over it, which would leave the donor a *locus pœnitentiæ*." In full accord with these cases are *Millspaugh* v. *Putnam*, 16 Abb. Pr. 380, and *Wheatley* v. *Purr*, 1 Keen 551. In *Bland* v. *McCullough*, 9 Weekly Rep. 65, A. from time to time purchased debentures to the amount of 3000*l*., and gave them into the custody of B., who lived with him as a wife. B. also, as they were purchased, from time to time received the stockbroker's receipts, and cut off the coupons as they matured, and accompanied A. to receive the dividends. A. had promised B. the debentures before they were purchased, and subsequently acknowledged and alluded to them as hers. Vice-Chancellor STUART held this to be a completed gift. For cases where under doubtful circumstances alleged gifts have been sustained, see *Penfield* v. *Thayer*, 2 E. D. Smith 305, and *Lemon* v. *Ins. Co.*, 38 Conn. 294. *McFadden* v. *Jenkyns*, 1 Phillips 153, established the proposition that a declaration of trust may be implied without any evidence of it in writing. A. shortly before his death sent a verbal message to B., his debtor, desiring him to hold the debt in trust for C. B. accepted the trust, and the transaction was communicated to C. both by A. and B. Upon a bill in equity being filed by C. to restrain A.'s executors from collecting the debt from B., Lord LYNDHURST said: "A. in directing B. to hold the money in trust for C., which was assented to and acted upon by B., impressed, I think, a trust upon the money which was complete and irrevocable. It was equivalent to a declaration by A. that the debt was a trust for C. The transaction bears no resemblance to an undertaking or agreement to assign. It was in terms a trust, and the aid of the court was not necessary to complete it."

The principles upon which these cases rest, and what are the requisites and evidence of a complete declaration of trust, will be better understood when certain cases are considered where alleged gifts have been held invalid because they lacked some such requisite, or the evidence of a completed declaration failed. In *Trimmer* v. *Danby*, 25 Law Jour. Ch. 424, upon the death of a testator ten Austrian bonds were found, among other securities, in a box at his house with the following indorsement: "The first five numbers of these Austrian bonds belong to and are H. D.'s property," signed by the testator. H. D. was his housekeeper, and had the key of the box in her custody. Vice-Chancellor KINDERSLEY said: "These bonds are capable of being transferred by hand, and as there was no actual delivery I must treat them as part of the assets of the estate." In this case it will be perceived that there was no reason why the testator, if he had intended to give the bonds to H. D., should not have actually delivered them. If there is any suspicion that an alleged gift was not to have an immediate effect, or if the donor does not do all that might be expected of one under the same circumstances to evince that such was his intention, the intended gift must fail.

The facts of *Murray* v. *Cannon*, 41 Md. 466, bear some resemblance to those in *Gardner* v. *Merritt*, *supra*, and the court, judging from their opinion, do not seem to have had that case called to their attention, else certain expressions in the opinion would have been modified. J. C. opened an account in a savings bank "to the credit of J. C.,

subject to his own order or to the order of M. E. C.," his daughter, to whom the deposit-book was given, with the statement that it was for herself and her brothers and sisters. It will be seen that no trust was expressed in the deposit-book, and it also appeared that the bank had no notice of the interest of the alleged donees. This clearly distinguished the two cases on principle, and the court held that no trust could be implied from the evidence of the statements of J. C. and placing the book in the hands of his daughter. The mere possession of a mortgage, together with loose statements of the mortgagee importing a gift to the holder, is not sufficient evidence of a gift to enable such holder to maintain an action upon the mortgage : *Johnson* v. *Spies*, 5 Hun 468.

The evidence that the acts and declarations of the donor imported a present gift, and not an intention to make one in the future, must be clear : *Taylor* v. *Staples*, 8 R. I. 170. Lord CRANWORTH, in *Scales* v. *Maude*, 6 De Gex, M. & G. 43, was led into certain expressions, which he subsequently in *Jones* v. *Locke*, L. R. 1 Ch. 25, repudiated, as not a true exposition of the law. The correctness of the decision in the case, however, remains unquestioned. In *Scales* v. *Maude*, the true ground upon which the decision should have been put was that the gift was testamentary, and that there never was a complete declaration of trust. Lord CRANWORTH, however, said, and this is what he subsequently repudiated : "Even if it were a declaration of trust, it would be invalid for want of consideration. A mere declaration of trust by the owner of property in favor of a volunteer, is inoperative, and this court will not interfere in such a case." In *Jones* v. *Locke*, a father put a check into the hand of his infant son, nine months old, saying : "I give this to baby for himself," and then took back the check, and put it in his safe, saying to his wife, "I am going to put this away for my son." Lord CRANWORTH said : "This is a special case, in which I regret to say that I cannot bring myself to think that either on principle or on authority there has been any gift or valid declaration of trust. No doubt a gift may be made by any person *sui juris* and *compos mentis*, by conveyance of real estate, or by delivery of a chattel, and there is no doubt, also, that by some decisions, unfortunate I must think them, a parol declaration of trust of personalty may be perfectly valid, even when voluntary. If I give any chattel, that, of course, passes by delivery, and if I say, expressly or impliedly, that I constitute myself a trustee of personalty, that is a trust executed, and capable of being enforced without consideration. I do not think it necessary to go into any of the authorities cited before me ; they all turn upon the question, whether what has been said was a declaration of trust or an imperfect gift. In the latter case, the parties would receive no aid from a court of equity if they claimed as volunteers. But when there has been a declaration of trust, then it will be enforced, whether there has been consideration or not. Therefore, the question in each case is one of fact. Has there been a gift or not ; or has there been a declaration of trust or not ? I should have every inclination to sustain this gift, but unfortunately I am unable to do so. The case turns on the very short question whether Jones intended to make a declaratiou that he held the property in trust for the child, and I cannot come to any other conclusion than that he did not. I think it would be of very dangerous example if loose conversations of this sort in important transactions of this kind should have the effect of declarations of trust." *Warriner* v. *Rogers*, L. R. 16 Eq. 340, contains a careful analysis of complicated facts by Vice Chancellor BACON, wherein the difference between a completed declaration of trust and decla-

rations of testamentary intent are clearly set forth.

3. There are cases in which voluntary written assignments or settlements of choses in action have been sustained as declarations of trust upon the principle that a declaration of trust is not confined to any form of words, but may be indicated by the character of the instrument. In these cases it is not necessary that there should be any actual transfer of the legal estate; the essential act is that the gift be perfected and complete, resting neither in promise nor unfulfilled intention. In *Kekewich* v. *Manning*, 1 De Gex, M. & G. 176, Miss Kekewich being on the point of marrying Sir Henry Farrington, made a settlement of property, in trust, for the use of herself, husband, and the issue of the marriage, with remainder over to certain volunteers. The husband died, leaving no issue, whereupon Lady F. made a new settlement for a valuable consideration, the objects of which were different from those of the first. The remainder-men in the first settlement filed a bill in equity to enforce its trusts. The Lords Justices held, that they were entitled to the relief they asked, L. J. KNIGHT BRUCE saying: "It is probably, or certainly in some instances, the course of this jurisdiction to decline acting at the suit of those whom it terms volunteers, though within that description a person claiming directly and merely under a gratuitous promise, oral or not under seal, which is *nudum pactum*, may be thought perhaps hardly to come, for such a person has in effect had no promise at all. In effect, no contract has been made with him. But whatever rule there may be against 'volunteers,' it does not apply to the case of one who, in the language of this court, is termed a *cestui que trust*, claiming against his trustee. For that which is considered by this jurisdiction a trust may certainly be created gratuitously. So that the absence of consideration for its creation is in general absolutely immaterial." In *Russell's Appeal*, 75 Penn. St. 269, the facts were almost identical with *Kekewich* v. *Manning*. A woman, in contemplation of marriage, conveyed her estate to trustees for the use of herself during life, then for her children according to her testamentary appointment, with remainder over in default of issue to her brothers and sisters. The husband having died first without issue, the settlor filed a bill to revoke the trust, and the court, while assenting to the general principles as settled in *Kekewich* v. *Manning*, and other cases, held that the purpose of the trust having failed, the absence of a power of revocation in the deed was under the circumstances a mistake which entitled the settlor to relief, and accordingly ordered the trustees to reconvey to the settlor in fee. In *Richardson* v. *Richardson*, L. R. 3 Eq. 686, E., by voluntary deed, assigned certain specific property, and "all other the personal estate whatsoever and wheresoever" of her, the said E., to R. absolutely; at the time of this assignment, E. was possessed of, amongst other property, certain promissory notes which were not mentioned specifically in the deed. Upon R.'s death these notes were found in his possession, but not endorsed to him; there was no evidence as to any delivery of the notes by E. to R. *Held*, that the assignment operated as a good declaration of trust. Referring to *Kekewich* v. *Manning*, Vice Chanc. W. PAGE WOOD said: "After that decision, I think it is impossible to contend that these notes did not pass by this instrument, because the rule laid down in that case, the decision in which was supported by reference to *Ex parte Pye*, 18 Ves. Jr. 140, was not confined merely to this, that a person who, being entitled to a reversionary interest, or to stock standing in another's name, assigns it by a voluntary deed, thereby passes it, notwithstanding that he does not in formal terms declare himself to

be a trustee of the property; but it amounts to this, that an instrument executed as a present and complete assignment (not being a mere covenant to assign on a future day) is equivalent to a declaration of trust. The good sense of the decision I think lies in this, that the real distinction should be made between an agreement to do something when called upon, something distinctly expressed to be future in the instrument, and an instrument which affects to pass everything independently of the legal estate." *Licey* v. *Licey*, 7 Barr 251, was a case somewhat similar in principle. A bond was delivered by an obligee to an obligor, to do with it what he pleased, and the act was sustained as a completed gift. In *Bond* v. *Bunting*, 78 Penn. St. 210, Martha Bond took out a policy of insurance upon the life of her husband. The day before his death, he joined her in an assignment, under seal, of the policy in trust, as to part of the proceeds for certain children of his by a former marriage. Notice of the assignment was immediately given to the trustees. The trust was upheld upon the principles stated in the foregoing cases, SHARSWOOD, J., saying: "Delivery in this, as in every other case, must be according to the nature of the thing; it must be *secundum subjectum materiam*, and be the true and effectual way of obtaining the command and dominion of the subject. If the thing be not capable of actual delivery, there must be some act equivalent to it. The donor must part not only with the possession, but with the dominion of the property. If the thing given be a chose in action, the law required an assignment, or some equivalent instrument, and the transfer must be actually executed. To hold otherwise would be in effect to decide that the owner of a chose in action, not evidenced by a note or bond, or other instrument, could not make a gift of it, which would be an unreasonable limitation of the right of property. It is certainly the tendency of all the modern authorities to maintain the general doctrine which may, indeed, be stated as a formula, that wherever a party has the power to do a thing, statute provisions being out of the way, and means to do it, the instrument he employs shall be so construed as to give effect to his intention. It cannot be doubted that Mr. and Mrs. Bond could, by a declaration of trust under seal, have constituted themselves trustees for the purposes set forth in the instrument, and why, if it cannot, for want of consideration, operate as a good equitable assignment, may it not be effectual as a declaration of trust?"

Morgan v. *Malleson*, L. R. 10 Eq. 475, comes very close to the line, and has been criticised in some later cases. The facts, however, seem to warrant the decision. S. signed the following memorandum: "I hereby give and make over to Dr. Morris an India Bond, No. D. 506, value 1000*l.*, as some token for all his very kind attention to me during illness. Witness my hand this 1st day of August 1868. (Signed) John Saunders." This memorandum was handed over to Dr. Morris, but the bond remained in the possession of S. It was held to be a valid gift. The distinction between this case and *Trimmer* v. *Danby*, *supra*, is that the assignment was delivered to the donee in the one case, while in the other it was not. Distinguishable from *Bond* v. *Bunting* for the same reason is *Trough's Estate*, 75 Penn. St. 115, and *Zimmerman* v. *Streeper*, Id. 147. If the subject-matter of the intended gift be shares of stock in a company whose charter or by-laws require certain formalities to make the transfer effectual, it is essential that the prescribed formalities be complied with. The reason seems to be that the donor has failed to do all which might be expected of him to make his intended gift complete:

Searle v. *Law*, 15 Sim. 95; *Milroy* v. *Lord*, 4 De Gex, F. & J. 264. Several English decisions also require that notice of the assignment be given to the trustee, if one is named: *Meek* v. *Kettlewell*, 1 Hare 464; and if there is no trustee named, then to the *cestui que trust*: *Edwards* v. *Jones*, 1 M. & C. 226. The burden of showing the completed character of the gift is upon the donee, and if the case is doubtful upon the facts, the gift cannot be sustained: *Antrobus* v. *Smith*, 12 Vesey Jr. 39. The facts of *Kennedy* v. *Ware*, 1 Barr 445, are not clearly stated in the report, and as the law is undoubtedly as stated in the opinion, in the absence of a trust relation, and as no mention is made of the establishment of a trust relation, it must be presumed that there was nothing in the facts to warrant such an hypothesis. R. C. D., Jr.

Supreme Judicial Court of New Hampshire.

ROWE *v.* PORTSMOUTH.

A city, having power by statute to construct public sewers, and to demand and receive pay from adjoining owners for liberty to enter their private drains into such sewers, is responsible for negligently suffering them to occasion a nuisance to the estates of such adjoining owners, if the nuisance does not result from the original plan of construction, and could be avoided by keeping them in proper condition.

In maintaining such public sewer, a city is bound to use that degree of care and prudence which a discreet and cautious individual would use if the whole loss or risk was to be his alone.

A city will not be liable for injuries caused to individuals, by an obstruction in such public sewer not placed there by its own officials or by authority of the city government, until after actual notice of such obstruction, or until, by reason of the lapse of time, actual notice may be presumed.

Case to recover damages sustained from a flow of water into the cellar of the plaintiff's house from the defendants' common sewer. Plea, the general issue. The case was referred to a referee, under the statute, who reported the following facts as proved: Prior to the month of July 1872, the defendants, for more than twenty years, had a common sewer leading from High street down through Hanover street by the plaintiff's dwelling-house, and emptying into the North Mill-pond, and the plaintiff's cellar was drained by a private drain leading into the defendants' common sewer of right. In 1867 a new tile drain was laid by the plaintiff in place of her old one of wood, which was discontinued, and said new tile drain led into the defendants' sewer. In 1867 the defendants built a new common sewer in place of their old one, which was discontinued, of cement stone pipe one foot in diameter, laying the same outside of the old sewer, nearer to the plaintiff's dwelling-house, and, in consequence, cut off all the private drains